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No. 86-1963

IN THE SUPREME COURT
OF THE
UNITED STATES
OCTOBER TERM, 1986

STATE OF ARIZONA,

PETITIONER,

vs.

CHICAGO TITLE INSURANCE CO., ET AL.,

RESPONDENTS.

On A Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Third Circuit

Brief For The States Of Connecticut And Wisconsin As Amici Curiae Supporting Petitioner

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The States of Connecticut and Wisconsin respectfully submit this brief amici curiae pursuant to Supreme Court Rule 36.4.

INTEREST OF THE AMICI CURIAE

The attorneys general of the amici states are the chief law enforcement officials of their states. Accordingly, they have a significant interest in the proper application and interpretation of the laws of the United States. Because the decisions of the district court and the Third Circuit in this case conflict directly with established precedent of the Supreme Court, the amici states support granting the petition for writ of certiorari.

In addition, the attorneys general of the amici states are authorized by state statutes and section 4C of the Clayton Act, 15 U.S.C. § 15c, to represent the legal interests of the residents of their respective states. The class action judgment entered by the district court forecloses the individual damage claims of the class members in Connecticut and

Wisconsin without the class members being able to exercise their due process right to opt out. The attorneys general of Connecticut and Wisconsin have a direct interest in ensuring that the residents of their states at least have the opportunity to exercise the constitutionally-protected right to opt out of the class action.

SUMMARY OF ARGUMENT

A. The finding by the administrative law judge of the Federal Trade Commission that the defendant title insurance companies are not exempt from antitrust liability for their price fixing in Connecticut and Wisconsin emphasizes that the residents of those states may have been particularly harmed by the lower courts' refusal to permit opt outs. Although the residents of Connecticut and Wisconsin had strong claims for damages against the title insurance companies and thus a substantial interest in opting out

of the unsatisfactory class action settlement, the judgment forecloses their claims.

B. The refusal of the court of appeals and the district court to allow absent plaintiffs to opt out is directly contrary to Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). In Shutts, the Court held that due process requires the right to opt out in class actions seeking to bind absent plaintiffs concerning their claims for damages.

ARGUMENT

A. The Ruling By The Administrative Law Judge Of The Federal Trade Commission Emphasizes That The Residents Of Connecticut And Wisconsin May Have Been Substantially Harmed By The Refusal To Permit Opt Outs

In the proceedings before the district court, the attorneys general of several states filed an objection to the proposed class action settlement, arguing that the settlement provided a substantial amount

of money to the attorneys for the named plaintiffs, but essentially no relief at all to the class. The objecting states further argued that the effect of Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985) (Court held that private anticompetitive conduct is immune from antitrust liability if state law permits the challenged activity and if the state supervises the activity), varies from state to state based on differences in each state's statutory and regulatory schemes. In particular, the State of Wisconsin argued that the defendant title insurance companies were not protected by the state action immunity defense because the necessary element of active state supervision was not present under Wisconsin's regulatory scheme.

Although the district court overruled the objection and entered judgment, the court expressed concern during a hearing

on April 10, 1986 that due process may be violated by foreclosing the damage claims of individual class members without affording them a right to opt out. The validity of the due process concerns expressed by the district court is dramatically highlighted by the subsequent ruling of the administrative law judge of the Federal Trade Commission, finding that the defendant title insurance companies had no state action defense for their price fixing activities in Connecticut and Wisconsin. In re TICOR Title Insurance Co., et al., FTC Dkt. No. 9190 (Dec. 22, 1986).[1/] The ruling shows that the

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[1/] In finding that the title insurance companies had no state action defense for their activities in Wisconsin, the administrative law judge relied upon the testimony of an official from the Wisconsin Office of the Commissioner of Insurance, who stated that Wisconsin did not actively supervise the price fixing activities at issue.

(Footnote 1 continued on page 7.)

states that filed an objection with the district court were correct -- the strength of the damage claims of consumers vary from state to state depending on each state's regulatory scheme. Moreover, the ruling by the administrative law judge of the Federal Trade Commission means that consumers in Connecticut and Wisconsin were substantially harmed by being denied the right to opt out of the class action settlement in that their strong claims for damages were foreclosed without ever having the opportunity to protect their

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(Footnote 1 continued.)

In addition, the administrative law judge ruled that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, which generally exempts the "business of insurance" from federal antitrust liability, did not protect the price fixing activities of the title insurance companies in any state. This aspect of the administrative law judge's ruling is not limited to the companies' activities in Connecticut and Wisconsin.

interests by removing themselves from an inadequate settlement.

In a stark manner, the result here illustrates the due process dangers created when members of a non-cohesive class are denied the ability to opt out. These dangers were discussed by one commentator in the context of a non-cohesive class action for back pay. See Rosen, Title VII Classes And Due Process: To (b)(2) Or Not To (b)(3), 26 Wayne L.Rev. 919 (1980). The due process risk is that the class members will not be given the right to opt out, and then the class representative will not subsequently be successful in obtaining meaningful relief. All absent members will lose their claims for monetary relief and "will be strictly bound by the result and will go down with their representatives, despite the fact that they were never given an opportunity to be heard and,

indeed, may never have even known of the existence of the suit." Id. at 934. Here, genuine relief was not obtained for the residents of the amici states, and the damage claims of the residents went down with the settlement that afforded real relief only to the named plaintiffs' counsel. Moreover, because the residents were notified of the class action only by publication, it is an obvious fiction to state that the residents even knew of the existence of the suit.

In Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969), Judge Godbold in a special concurrence also recognized the due process pitfalls for absent class members in class actions seeking monetary relief:

> The broad brush approach of some of the Title VII cases is in sharp contrast to the diligence with which in other areas we carefully protect those whose rights may be affected by litigation. If this were an

> individual cross-action against an employee at one of appellee's remote terminals we would turn intellectual handsprings over questions of notice and process to him and opportunity to protect his interests -- such issues as whether the marshal dropped the notice at the door or handed it to the child at the front gate. But when the problems is multiplied many-fold, counsel, and at times the courts, are moving blithely ahead tacitly assuming all will be well for surely the plaintiff will win and manna will fall on all members of the class. It is not quite that easy.

417 F.2d at 1127 (emphasis added).

The ruling by the administrative law judge of the Federal Trade Commission shows that there was a substantial diversity among the class members. All class members should have been able to decide whether to opt out and prosecute their own litigation rather than be bound by an unsatisfactory settlement.

B. The Decision By The Third Circuit Denying Opt Outs Is Contrary To This Court's Ruling In Shutts

A class action is an exception to the general rule that the responsibility is on

the individual to authorize a lawyer to seek protection of the individual's rights in court. J. Cound, J. Friedenthal & A. Miller, Civil Procedure 1-2 (2d ed. 1974). Generally, litigation is grounded on a voluntary agency relationship between attorney and client. Conversely, in a class action, there is no voluntary agency relationship between the attorney and the absent class members. In fact, the absent class members may never even know that they are represented by the attorney. At least in part, the absence of the voluntary agency relationship creates the potential for due process violations in class actions.

Since at least as early as 1940, the Court has imposed due process requirements on class actions or other types of representative suits. In Hansberry v. Lee, 311 U.S. 32 (1940), the Court held that an individual could not be bound by a

judgment in a representative suit unless the named parties adequately represented the absent class members and the prosecution of the litigation was within the common interest.

In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), which involved a statutory action similar to a class action, the Court held that due process requires reasonable notice to be given to interested parties, apprising them of the pendency of the action.

The Court's most recent decision on the due process requirements applicable to class action is Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). The Court held that a class action judgment may bind an absent plaintiff concerning his claim for damages only if several due process protections are afforded. Citing Mullane, the Court stated that the absent plaintiffs must receive reasonable notice

of the litigation. 472 U.S. at 811. Citing Hansberry, the Court stated that due process requires the named plaintiff to represent the absent class members adequately at all times. 472 U.S. at 812. Most importantly, the Court ruled that due process requires the right to opt out in class actions seeking to bind absent plaintiffs concerning their claims for damages:

> Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court.

472 U.S. at 812.

The district court and the Third Circuit ignored Shutts and refused to permit opt outs. This contravention of due process has an especially harsh impact on the residents of the amici states because those residents may have had

viable claims for damages against the defendant title insurance companies.

CONCLUSION

For the foregoing reasons, the amici states respectfully request that the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be granted.

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